

Appeal No. 2006AP1380

Cir. Ct. No. 2004CV12

**WISCONSIN COURT OF APPEALS
DISTRICT II**

**STAN JOHNSON, KARLA THUROW, THOMAS
McLAUGHLIN, AND WISCONSIN EDUCATION
ASSOCIATION COUNCIL,**

PLAINTIFFS-APPELLANTS,

V.

ELIZABETH BURMASTER,

DEFENDANT-CO-APPELLANT,

**NORTHERN OZAUKEE SCHOOL DISTRICT, NORTHERN
OZAUKEE SCHOOL DISTRICT BOARD OF EDUCATION,
JEFFREY M. LALLENSACK, AND WALTER CLARKE, K12
INC.,**

DEFENDANTS-RESPONDENTS,

**MARK GUNDRUM AND MARY GUNDRUM, AND THEIR
CHILDREN, J. G. AND B. G., STEPHEN McMANUS AND
MOIRA McMANUS, AND THEIR CHILD, K. M., JOEL
JENSEN AND CARRIE JENSEN, AND THEIR CHILD, N. J.,
SCOTT KULLA AND MARY KULLA, AND THEIR CHILDREN,
C. K. AND G. K., THOMAS MAGNOR AND MARY
MAGNOR, AND THEIR CHILDREN, A. M., B. M. AND E. M.,
BRION COLLINS AND JENNIFER COLLINS, AND THEIR
CHILD, E. C., DANIEL FRITZ AND JENNIFER FRITZ, AND
THEIR CHILD, M. F., JEFFREY A. MORRIS AND LOUISE J.
MORRIS, AND THEIR CHILD, J. M., MARK M. MEJAC AND
MARIE MEJAC, AND THEIR CHILD, P. M.,**

INTERVENING DEFENDANTS-RESPONDENTS.

FILED

JUL 3, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2005-06)¹ this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Does WIS. STAT. § 118.40(3)(c), which states that a school board “may not enter into a contract for the establishment of a charter school located outside the school district” forbid a school district from establishing a “virtual charter school” in which students are educated in their homes and in which the majority of the students reside outside of the school district?

2. Does WIS. STAT. § 118.51, the open enrollment statute, which speaks of pupils “attend[ing] a public school ... in a nonresident school district”² and “attending school in a nonresident school district” allow open enrollment in a “virtual charter school” in which the students remain at their homes outside of the district?

3. Does a “virtual charter school” in which the parents of the students provide a significant part of the students’ instruction violate WIS. STAT. § 118.19(1), which requires that “[a]ny person seeking to teach in a public school,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN STAT. § 118.51 contains variations on this phrase throughout, some excluding the article “a” before “public school,” and the parties dispute the significance of the various formulations.

including a charter school ... shall first procure a license or permit from the department”?

BACKGROUND AND ANALYSIS

Plaintiffs, several state taxpayers and the Wisconsin Education Association Counsel, commenced this declaratory judgment action to challenge the legality of the Wisconsin Virtual Academy (WIVA), a charter school established by the Northern Ozaukee School District. Plaintiffs named as defendants the District, the School Board and its officials, and K12 Inc., a Delaware corporation with which WIVA contracts to provide educational services (collectively “the District”) along with State Superintendent Elizabeth Burmaster. Burmaster eventually adopted Plaintiffs’ position with regard to Issue 3 and has not taken a position on the other issues in this appeal. The circuit court allowed a group called Children and Parents of Wisconsin Virtual Academy to intervene as defendants. All parties moved for summary judgment, and the circuit court granted the motions of the defendants, holding that WIVA complies with applicable law.

Although there is some suggestion by Burmaster and the original defendants that genuine issues of material fact may exist, the overwhelming majority of all parties’ arguments deal with the legal conclusions that should be drawn from agreed-on facts. Though the record is voluminous, the basic facts are as follows.

The Northern Ozaukee School District created WIVA in 2003. The curriculum materials are provided electronically and by mail by K12, which also loans computers to students. Students are educated in the home under the direction of their parents. At the time the lawsuit was commenced, there were 619

students enrolled in WIVA, six of whom resided in the district, with the rest enrolled under Wisconsin's open enrollment statute. For each out-of-district student enrolled in WIVA, the District receives state aid which is also deducted from the district in which the student resides. The District deducts an "oversight fee" and operation costs and passes the remainder of the aid payments on to K12.

WIVA's administrative office is located in the district and comprises a principal, assistant principal, and secretary. WIVA also employs certified teachers, who work out of their homes around the state. The teachers provide support to the parents and also engage in some direct instruction. The precise allocation of "teaching" responsibilities between the WIVA-employed teachers and the students' parents generated "a flurry of submissions" in the circuit court; however, it is safe to say that the large majority of the student's educational time is spent working with the parent rather than with the certified teacher.

A brief summary of the issues and the parties' positions on them follows.

Plaintiffs argue that WIVA is in violation of each of the three above-mentioned statutes, because the charter school is located outside the district (where, they argue, the educational activities take place), contrary to WIS. STAT. § 118.40(3)(c); the open enrollment students do not "attend" public school in the district in accord with WIS. STAT. § 118.51; and the parents, who are unlicensed, serve as the "teachers" of WIVA contrary to WIS. STAT. § 118.19(1).

Burmaster agrees with Plaintiffs that the parents of WIVA are the "teachers" under the relevant statutes, and that since they are unlicensed by the state, WIVA is in violation of the licensure statute. Burmaster takes no position with regard to Plaintiffs' other arguments.

The District disagrees with each of Plaintiffs' claims. It argues that WIVA is not located outside the school district because its physical headquarters, from which its administrators work, is within district boundaries. It further argues that its students "attend a public school" in the district by enrolling in and being educated by WIVA since, as noted above, WIVA is not outside the district in the District's view. Finally, it posits that "teacher," as used in the licensure statute, refers only to professionals employed by schools, not to the parents involved in WIVA.

Intervening Defendants agree with the District that all aspects of WIVA's operation are in accord with the law, but focus their arguments on separation of powers and policy considerations that they contend support the District's position.

Two amici have also submitted briefs: the Wisconsin Coalition of Virtual School Families, Inc., in support of the District, and the Cooperative Educational Service Agency #9, in support of the Plaintiffs.

The questions involved in this case are of first impression, and their resolution will have significant statewide impact in education finance and policy. The supreme court last year agreed to decide a case presenting two of the three issues presented here, involving some of the same plaintiffs and a different "virtual school"; that case was voluntarily dismissed before a decision could be rendered. *See Johnson v. DPI*, No. 2003AP1575, certification (WI App Mar. 18, 2004), *certification granted*, 2004 WI 114, 273 Wis. 2d 659, 684 N.W.2d 139. We therefore believe that the issues in this case are most appropriately resolved by the supreme court.

